

AUG 19 1978

MICHAEL RUDAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1978

78-282
No.

DONALD E. CURRY, ET AL,

Petitioners,

v.

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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Petitioners, intervenors in the proceedings below, pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 21, 1978. The names and identities of Petitioners and the many parties Respondent, as well as the Amicus Curiae, are set forth in Appendix "A" to the Petition of Nolan Estes, et al. filed with this Court. The Appendices attached to the Petition of Nolan Estes, et al. are adopted as the Appendices to this Petition and are referred to throughout simply as "Appendix A" or "Appendix B."

OPINIONS BELOW

The opinions, orders and judgment of the District Court are set forth in Appendix "B" to the Petition of Nolan Estes, et al. (pages 4a-129a) and are reported in part at 412 F. Supp. 1192. The opinion of the Court of Appeals is set forth in Appendix "C" to the Petition of Nolan Estes, et al. (pages 130a-146a) and is reported at 572 F. 2d 1010.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1978. A timely Petition for Rehearing in Banc was denied on May 22, 1978. This petition for certiorari was filed within 90 days from that date. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In the absence of evidence of a finding that racial imbalance resulted from intentional segregative actions on the part of the Dallas Independent School District, do the District Court and Court of Appeals have the power to order student reassignment?

2. Can there be a vestige of a state imposed dual school system in the Dallas Independent School District when every child presently attending schools in that district has been assigned to his or her school under a plan mandated by the United States Courts?

3. Does the Constitution require the imposition of a remedy which the overwhelming evidence demonstrates not only fails to remedy the problem at which it is directed, but exacerbates the problem.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional and statutory provisions involve the equal protection clause of the Fourteenth Amendment to the Constitution of the United States which provides in pertinent parts as follows:

"Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

20 U.S.C. § 1701 et seq. (Equal Education Opportunity Act), § 1704 provides "the failure of an educational agency to attain a balance on the basis of race, color, sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of the laws."

§ 1712 of such Act provides "in formulating a remedy for denial of equal educational opportunity or denial of equal protection of the laws, a court, department or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of laws."

§ 1705 provides "the assignment by an educational agency of a student to a school nearest his place of residence which provides appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex or national origin or the school to which such student is assigned is located on its site for the purpose of segregating students on such basis."

STATEMENT OF THE CASE

Since 1965 every student assignment in the Dallas Independent School District has been mandated by the United States Courts. In 1965 the Court of Appeals for the Fifth

Circuit in *Britton v. Folsom*, 348 F. 2d 158 (5th Cir. 1965) and *Britton v. Folsom*, 350 F. 2d 1022 (5th Cir. 1965) ordered the immediate assignment of students to the neighborhood schools without regard to race. Student assignment within the Dallas Independent School District has continuously since that date been directed and mandated by the United States District or the United States Court of Appeals for the Fifth Circuit, and no student assignment plan has been adopted except as permitted by such courts.

No child presently in the 12 grades of the Dallas Independent School District has ever attended a school except by an assignment approved by the United States Courts.

In 1971 prior to the mandatory District Court reassignment order based on the race of the students the Dallas Independent School District student body was 69% Anglo. In 1975 it was 41.1% Anglo, and in 1978, the Anglo student body was 35.38%.

Since 1971 every child in the Dallas Independent School District has been entitled to transfer from a school in which his race is a majority to any school in the district where his race is a minority provided that such transfer does not adversely upset the racial balance of the transferee school. No child is deprived of an opportunity to attend an integrated school in which his race is not the majority.

In all of the numerous cases which have been tried concerning the Dallas Independent School District there never has been a finding of intentional segregative action by the Dallas Independent School District. Since 1965 there can be no such finding, for every student assignment program has been mandated or approved by United States Courts.

The court ordered student assignment plan in 1971 was on a finding that vestiges of a dual school system remained "solely on the basis of a racial imbalance between schools in the district."

Not only did the court have no specific findings of intentional segregative intent in connection with any student school assignment, the District Court in its March 10, 1976 order found that the Dallas Independent School District acted in good faith since 1971 and has made reasonable efforts to fulfill the obligations imposed by the orders of the courts (page 15a, Appendix B). The court further found that testimony established that the Dallas Independent School District has undertaken in good faith and on its own to equalize the educational opportunity for all children. The District Court adopted *plaintiff's* witness, Dr. Francis S. Chase, statement in his report that "the Dallas Independent School District in recent years, has acknowledged frankly the existence of persisting inequalities and inadequacies in its provisions for education. Instead of regarding these conditions as inevitable, the District has moved progressively to treat them as challenges with which it must cope swiftly and effectively. All school systems, and especially those in our larger cities, are faced with the urgent necessity of alleviating the learning disabilities which have their roots in poverty, prejudice, and other forms of discrimination. No other school district offers a better prospect for significant progress in this direction." See page 17a, Appendix B.

The overwhelming evidence in this record establishes that not only do orders of courts have a disrupting effect on the educational process but the threat and continuation of litigation concerning student assignments, have an equally disrupting and tragic effect.

REASONS FOR GRANTING THE WRIT**1.**

Contrary to *Dayton* and *Austin II*, there has never been a finding of intentional segregative action in Dallas causing any racial imbalance nor any remedy directed at any segregative action which caused any racial imbalance.

The courts below have totally ignored the fact that there has never been a finding or showing of intentional segregative action in Dallas causing any racial imbalance and no Court has directed a remedy at any segregative action which caused any racial imbalance. Instead each Court has imposed its own views of social policy without regard to action or effect. This court in *Dayton Board of Education v. Brinkman*, (June 27, 1977) following *Washington v. Davis*, 426 U.S. 229 (1976), *Wright v. Rockefeller*, 376 U.S. 52 (1964), *Arlington Heights v. Metro Housing Corp.*, (Jan. 11, 1977), has consistently held that "proof of racial discriminatory intent or purpose is required to show a violation of the equal protection clause." The simple fact of the matter is, as the evidence overwhelmingly shows, that racial imbalance of the Dallas Independent School District is not caused by any action of the Dallas Independent School District. The evidence is that most of the "one-race" schools complained of in East Oak Cliff by the N.A.A.C.P. began as one-race white schools and became one-race black as a result of demographic changes. The fact that blacks in Dallas tend to live together is no more unusual than the fact that Irish, Italians, Jews, Poles and other ethnic groups tend to congregate in neighborhoods. It would be absurd to urge that composition of basketball teams in the National Basketball Association is evidence of discrimination against whites by blacks, but with solemnity court

after court insists that mere evidence of black neighborhoods is evidence of discrimination in school districts. The rhetoric of *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) is misapplied as requiring the remedy of nondiscriminatory voluntary racial imbalance, rather than the intentional segregative circumstances at which they were directed.

Not only have there been no findings of particular discriminatory acts causing racial imbalance, the evidence is overwhelming that there is nothing that the Dallas Independent School District could have done which it is not already doing to prevent such racial imbalance. To a great extent such imbalance is the result of attempts to correct such racial imbalance by student assignment, resulting in the Dallas Independent School District going from a 69% Anglo school district to a 35% Anglo school district.

The District Court and The Fifth Circuit further failed to find what "increment" of any imbalance was caused by the non-existent segregative act, or what remedy would be required solely to right any such constitutional wrong. All opinions are dedicated to the question of how to best mix the racial imbalance. It is obvious the Fifth Circuit refuses to follow this Court's instructions to it in *Austin II* (*Austin Indep. School District v. United States*, 429 U.S. 990 (1977)).

2.

The remedy proposed by the Court of Appeals has been demonstrated to be a complete failure in accomplishing its goals.

The remedy proposed by the Court of Appeals has been demonstrated to be a complete failure in accomplishing its goals. Assuming that the model is to achieve greater integration of the races in the Dallas Independent School Dis-

trict, to increase academic achievement, to lessen racial tension, and to increase the self-image of the black student, reassignment by busing has been a total and complete failure as a remedy. The overwhelming evidence in this cause is that student reassignment through busing has resulted in the elimination of any opportunity for meaningful integration of the races. The overwhelming evidence in the record is that it has failed to show any improvement in academics, has increased racial tension, and has lowered the self-image of blacks. In brief, the testimony in this case of noted sociologists such as Dr. James E. Coleman, Dr. Nathan ~~Nelson~~ Glazer, and Dr. David Armor, and noted educators such as Dr. John Letson, former superintendent of schools of Atlanta, Georgia, Dr. Nolan Estes, superintendent of the Dallas Independent School District, and Dr. O. Z. Stephens, deputy superintendent of schools of Memphis, Tennessee, have demonstrated that the United States courts have set out in an area in which they are unequipped to travel, and have presumed to direct education without any expertise in that area. The results not only in Dallas but in every urban area with a large minority population has been disaster for the cause of and prospect for integration. In Dallas the results are reflected by the loss of more than 40,000 Anglo students. The trial court found as a fact that busing of Anglo students to presently minority schools had been a failure through no fault of the School District.

3.

It is urgent, for the sake of preserving any integration in the DISD, that this Court take the case now.

The fact that the case has been remanded for further finding and this court will have another chance to hear the matter, is not a reason for not accepting the case now and

directing the new findings or new hearings along the lines of *Dayton School Board v. Brinkman*, *supra*, rather than along the unsupported and wrong racial mixing tests of "time and distance." The evidence in this case as presented by expert witnesses is overwhelming that the destruction caused by orders of courts is equally caused by the threat of such orders while matters are in litigation. The elimination of the middle class student from the public school system is based upon people's perception of the vitality of an educational system. These people include those who move to the suburbs or abandon the public schools for private school systems, but it also includes people moving into an area in replacement of normal outmovement who do not choose the Dallas Independent School District with its turmoil and litigation over any one of numerous suburban school systems readily available with none of the turmoil, litigation and absurd rulings.

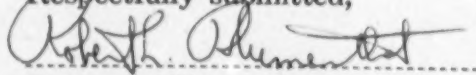
The nation as demonstrated by all of the current literature is faced with an urban crisis of its central cities. The amenities of school districts and an education are essential features of any urban society. Without them that society dies. The intervention by the federal courts in an area, not to correct discrimination which it cannot identify, but merely to foster a social policy which it does not understand leads to what is amounting to the destruction of the public school system.

Perhaps it is well that the metropolitan United States is rushing into the European system where public schools are only for the lower class or lower-middle class, and private schools for the middle and upper class. If this is the result which lower federal courts are trying to achieve by ordering ill-considered racial formulas and busing, then this Court should soberly discuss that approach instead of allowing the federal judiciary to bring it about on the basis of a constitutional principle inaccurately applied.

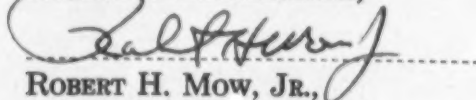
CONCLUSION

As parties who believe in integrated schools, but see the courts destroying any meaningful opportunity to have them Petitioners pray that this Court return the Fifth Circuit, as it did in *Austin II*, to the principles of *Brown v. Board of Education*, 347 U.S. 483 (1954). There this court decided that legislators, no matter how good or bad intentioned, should not decide where children went to school on the basis of the color of their skin. At the risk of impertinence, we respectfully suggest that United States judges are no better equipped than legislators to decide where children should go to school based solely on the color of their skin. The Constitution of the United States demands an "equal protection" of all our citizens *without* regard to race — not *with* regard to race. A non-discriminatory racially neutral school assignment program has been adopted by the Dallas Independent School District since 1965. Transfers guaranteeing the right of any child to an integrated education have been provided. Petitioners pray that this Court quickly grant certiorari so that meaningful integration of the schools in Dallas may occur as a result of the integration of Dallas which has occurred, and so that resegregation does not triumph in Dallas, as elsewhere.

Respectfully submitted,



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Dated: August 18, 1978.

PROOF OF SERVICE

I, Robert L. Blumenthal, an attorney for Petitioners Curry et al. herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ~~18th~~ 19th day of August, 1978, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the following Counsel for Respondents, Counsel for Petitioner Nolan Estes et al., Counsel for Amicus Curiae, and the Respondent Pro Se:

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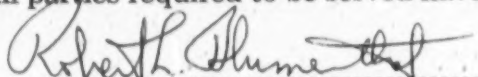
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by mailing same to such Counsel and Respondent pro se at their respective addresses and depositing the same in a United States mail box in an envelope properly addressed to such addresses with first class postage prepaid.

I further certify that all parties required to be served have been served.



Robert L. Blumenthal
Attorney for Petitioners
Curry et al.

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